No. 13298.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS CROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Jurisdictional Statement.

This appeal is taken from an Order denying appellant's motion made pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, namely, to set aside a Judgment of Conviction and permit appellant to withdraw his plea of guilty. This Order was entered on December 8, 1951, by the District Court of the United States in and for the Southern District of California in case No. 19946 Criminal [Tr. 7].[1] The District Court had jurisdiction to entertain the Motion under Title 18 U. S. C. Sections 3231, 3234, Rule 20 and Rule 32(d), Federal Rules of Criminal Procedure. This Court has jurisdiction pursuant to Rule 37(a), Federal Rules of Criminal Procedure, Title 28 U. S. C. Section 1291.

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[1]References to the Transcript on Appeal are designated "Tr. ....." in this brief.

Questions Presented.

Is it a Federal offense under Section 408, Title 18, United States Code (1946 Edition) to transport across state lines an automobile fraudulently purchased by means of a worthless check?

Appellee respectfully submits that if the answer to this issue is answered in the affirmative, then there is no need to answer the second question raised by appellant; and if the answer is in the negative, then appellee has no objection to permitting appellant to withdraw his plea of guilty.

Material Facts.[2]

The facts, for the purpose of this appeal, have been agreed upon by the parties hereto, and the facts as set forth in appellant's Opening Brief are correctly stated.

Statutes and Regulations Involved.

(A) The Penal Statute.

Section 408 of Title 18, United States Code (1946 Edition), known also as the Dyer Act, provides:

> "Whoever shall transport or cause to be transported in interstate or foreign commerce, a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both."[3]

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[2]The Agreed Statement on Appeal [Tr. 2-5] is supplemented by reference to the transcript in case No. 12478 of this Court which was filed in an earlier appeal in this case. It has been stipulated by the parties hereto that reference may be made to said Transcript on this appeal [Tr. 10-11].

[3]Immaterial portions of the statute have been omitted.

(B) The Rule Under Which the Appellant Filed His Motion to Set Aside a Judgment of Conviction and Withdraw His Plea of Guilty in the District Court.

Rule 32(d) of the Federal Rules of Criminal Procedure:

> "Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Summary of Argument.

The argument of the Government will be confined to the question of whether or not a motor vehicle which has been obtained by means of fraud or false pretenses is "stolen" within the meaning of Section 408 of Title 18, United States Code (1946 Ed.).

ARGUMENT.

A Motor Vehicle Which Has Been Obtained by Means of Fraud or False Pretenses Is "Stolen" Within the Meaning of Section 408 of Title 18, United States Code.

At the time of sentence, the Court below was acquainted with appellant's activities in connection with the offense with which he was charged [Tr. 23, lines 14-18]. Likewise, at the time the Court made the Order denying appellant's motion made pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, the Court was fully aware of the method by which appellant had obtained his illegal possession of the motor vehicle.

The appellant's argument was then, and is now, principally based on the authority *Hite v. United States* (C. C. A. 10, 1948), 165 F. 2d 973. It must be assumed that the Court below rejected this authority in denying the appellant's motion. It is appellant's argument that he obtained both possession and title to the automobile by giving a worthless check, that there was thus no common law larceny, and hence, the automobile transported across state lines was not "stolen" within the meaning of Section 408 of Title 18, United States Code. There are authorities which cast serious doubt upon the correctness of the ruling of the *Hite* case and other cases cited by appellant following the *Hite* case.

In the case of *Crabb v. Zerbst* (C. C. A. 5, 1938), 99 F. 2d 562, the Court had occasion to define the word "steal" as it appeared in Title 18, United States Code,

Section 100.[4] In answering the defendant's contention that "to steal" was "to commit larceny" the Court said:

> " 'Steal' and 'purloin' are not synonymous, though used in dictionaries in defining larceny and in defining each other; and 'steal,' *having no common law definition* to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to 'purloin.' " (Emphasis added.)

In *United States v. Handler* (C. C. A. 2, 1944), 142 F. 2d 351, the defendant insisted that the word "steal" was synonymous with the act of common law larceny. The statute under consideration was the National Stolen Property Act [Sec. 415, Tit. 18, U. S. C. (1946 Ed.)],[5] and the controversy had to do with the meaning of the phrase "with intent to steal and purloin." At page 353, the Court said:

> "But we cannot accept the appellant's argument that a taking with intent to steal is synonymous with technical larceny. In various federal statutes the word 'stolen' or 'steal' has been given a meaning broader than larceny at common law. See *United*

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[4]Section 100 (Criminal Code, Section 47) "Embezzling public moneys or other property. Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or other valuable thing whatever, of the moneys, goods, chattels * * *."

[5]"Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities or money, of the value of $5,000 or more, theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin. . . ."

States v. Trosper, 127 Fed. 426, 477, 'steal' from the mail; *United States v. Adcock,* 49 Fed. Supp. 351, 353, interstate transportation of 'stolen' automobile. . . ."

See also:

United States v. De Normand et al. (C. C. A. 2, 1945), 149 F. 2d 622—"Steal" from interstate shipment of freight.

In *United States v. Adcock,* 49 Fed. Supp. 351 (D. C. W. D. Ky., 1943), which was cited with approval by the United States Court of Appeals for the Second Circuit, in *United States v. Handler* (C. C. A. 2, 1944), 142 F. 2d 351, cited *supra,* the Court held that the word "stolen," as used in Section 408, was broad enough to include embezzlement. The owner loaned his automobile to a former employee to go to a nearby town. The employee made his planned journey and then decided to keep the automobile. He subsequently drove the car over several state lines, and was finally indicted for violation of Section 408, Title 18, United States Code, the National Motor Vehicle Theft Act. Under no theory could the employee be said to have committed larceny by the taking, for the machine was in his sole possession, rightfully, at the time of his criminal conversion of it. It was an embezzlement of the automobile. The Court, in defining the word "stolen" as it appeared in the statute, said:

> "I am of the opinion that the word 'stolen' is used in the statute not in the technical sense of what constitutes larceny, but in the well known and accepted meaning of *taking the personal property of another for one's own use without right or law,* and that such a taking can exist whenever the intent to do

so comes into existence and is deliberately carried out regardless of how the party so taking the car may have originally come into possession of it." (Emphasis added.)

The ruling in the *Adcock* case, *supra,* was followed by the United States Court of Appeals for the Sixth Circuit in *Davilman v. United States* (C. C. A. 6, 1950), 180 F. 2d 284. In this case, which was brought under the Dyer Act (18 U. S. C., Sec. 408), the defendant and his wife rented an automobile in Las Vegas, Nevada, and later transported it to Kentucky. There was evidence that they had decided to appropriate the car for their own use. On a subsequent Motion to vacate judgment of conviction and sentence, the defendants urged that even though the automobile had been appropriated, they could not be punished under the Dyer Act because the original taking was with the consent of the owner. The Court denied the motion and the Order was affirmed on appeal. The appellate court held that defendants' conduct constituted the interstate transportation of a "stolen" motor vehicle within the meaning of the Dyer Act.

In *United States v. Sicurella et al.* (C. C. A. 2, 1951), 187 F. 2d 533, defendants had the permission of the owner to use his car at any time, even on long trips. The car was driven to another state by the defendants for the purpose of sale to a dealer. The defendants did not have permission to sell the car, and were indicted and convicted for violation of the Dyer Act (Sec. 2312 of Tit. 18, U. S. C. (1950 Ed.)). Defendants contended on appeal that since they had obtained possession of the car with the owner's consent, the car was not "stolen" within the meaning of the Dyer Act. Judge Augustus N. Hand,

speaking for the Court, rejected this contention, on page 534:

> "Defendants say that a conviction under the Dyer Act cannot stand unless there is evidence sufficient to prove larceny under the narrowest definition of that crime at common law. *Such a contention would not help the defendants even if it were sound—which we do not intend to intimate—for a narrow common law definition is not required under the Dyer Act.* . . ." (Emphasis added.)

The construction given to the Dyer Act by the Courts of Appeals for the Second and Sixth Circuits is consistent with reason and logic, and would appear to be in accord with what must have been the objective sought to be achieved by Congress in the enactment of this and related federal statutes. The ruling of the *Hite* case, narrowly limiting the operation of the National Stolen Vehicle Act to the interstate transportation of motor vehicles acquired only by common law larceny is neither required by the statute nor designed to halt the interstate traffic in illegally obtained motor vehicles.

In the Dyer Act and in the various other federal statutes punishing the interstate transportation of stolen property, Congress has not defined the words "stolen" or "steal." There is nothing in these statutes to suggest that the meaning of these terms was to be restricted to the common law definition of larceny. It would appear plain that in seeking to reach and punish conduct which is largely beyond the reach of local law enforcement, the scope of the statute would extend to any unlawful taking of personal property, whether such taking be by larceny, embezzlement, fraud, or false pretenses. There is no discernible reason for distinguishing between those who

obtain possession of property by any of these methods. All such means of illegally acquiring possession of property of another are plainly offenses of equal gravity, and are equally difficult to reach by local law enforcement when such property is moved across state lines.

It is submitted that the interpretation given to the word "stolen" as it appears in the Dyer Act by the Courts of Appeals for the Second and Sixth Circuits—and by the Court below—is the interpretation which gives the full effect to this important statute which Congress must have intended, is both reasonable and logical, and deprives no one of any rights, substantial, or otherwise, nor leads to any injustice. Under this interpretation all who transport stolen property across state lines, however such property was stolen, whether by larceny, by fraud or by false pretenses, since they come equally within the scope of the evil sought to be eradicated, come equally within the scope and operation of the statute, and are equally subject to its terms.

For the foregoing reasons the order of the Court below denying Appellant's motion should be affirmed.

Respectfully submitted,

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